No. 4059.

In The United States Circuit Court of Appeals

For The Ninth Circuit

In the Matter of
PATTERSON-MACDONALD SHIPBUILDING COMPANY, a corporation,
Bankrupt.

THOS. CARSTENS and STACIE C. CARSTENS, his wife,
Appellants,

—VS.—

JOHN L. MCLEAN as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a corporation, Bankrupt,
Appellee.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

MOTION TO DISMISS.

The appellee moves that the appeal herein be dismissed upon the ground that this court has no jurisdiction thereof.

ARGUMENT ON MOTION TO DISMISS

The Referee certified the question for review as follows:

"Was the Referee in error in denying the

petition of Thomas Carstens and Stacie C. Carstens, his wife, for leave to file a proof of claim for the amount of the taxes for the year 1919, in view of the law and the facts touching the question at issue?"

The matter thus presented is a "proceeding in bankruptcy", as distinguished from a "controversy at law or in equity" arising in the course of bankruptcy proceedings, of which this court would have jurisdiction under Section 24 of the Bankruptcy Act. Nor does it seem that the case is appealable to this court under Section 25-a (3) of the Act, under which this appeal is apparently brought. That section applies to a judgment allowing or rejecting a debt or claim, and apparently contemplates a final decision upon the merits of such debt or claim. The merits of the claim asserted are not involved in this case at all, but only the question of the application of the limitation of Section 57-n. It is peculiarly a proceeding in bankruptcy in which the jurisdiction of this court is limited to superintendance and revision in matters of law of the proceedings of the lower court under Section 24-b of the Act.

Morehouse v. Pacific Hardware & Steele Co., 177 Fed. 337, (C.C.A. Ninth Circuit);

In re Schaffner, 267 Federal, 977, (C.C.A. Second Circuit);

In re Nagel, 278 *Federal*, 105, (C.C.A. 2nd Circuit).

ARGUMENT UPON THE MERITS.

Both the Referee and the District Court recognized the spirit of liberality evidenced by the courts in permitting amendment of informal and defective claims, but were impelled to hold that the principle could have no application here, because no claim whatever had been filed within the year, which could be made the subject of an amendment.

The general rule is stated in Remington on Bankruptcy, 3rd Edition, as follows:

> "888. AMENDMENT OF CLAIM AFTER EXPIRATION OF YEAR.—A proof of debt may be amended after the close of the year, for the amendment, like all amendments, reverts to the time of the original filing and takes effect from that time, and should in all respects be considered the same, as if it had been already filed then."
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> Vol. 2, p. 284.
>
> "889. BUT AN ORIGINAL CLAIM MUST EXIST, FILED WITHIN THE YEAR.—Of course, there must have been an original proof duly filed within the year; otherwise there would be nothing by which to amend; and the power of amendment is not to be distorted to let in dilatory creditors who have filed no proof within the limited year."
>
> Vol. 2, p. 286.

And in Collier on Bankruptcy, 11th Ed., it is said:

> "But an amendment amounting to the presentment of a new claim will not be allowed after a year has elapsed. There must be before

> the court the substance of a claim in some form, filed or presented within the proper time; whether formal or informal, a claim must show that a demand is made against the estate, and must show the creditor's intention to hold the estate liable."
>
> Page 794.

The several cases cited by appellants in which amendments were permitted after the expiration of the year, support and illustrate the general rule as above stated, but they do not enlarge it. An examination of such cases will disclose that where the amended claim was allowed to be filed, it was based on a substantial claim filed against the estate within the year, as provided by Section 57-n.

In the quotation from *Hutchinson v. Otis*, 115 Fed. 937 (Appellants' Brief, p. 9) a clerical error in quotation results in a serious change in meaning. It is said that the proof "failed in every substantial particular" to comply with the general orders of the Supreme Court in reference to such matters. The language of the case is that the proof failed "in very substantial particulars," to so comply. As is stated in that portion of the decision quoted at the top of page ten of appellants' brief, "there was enough in the original proof by which to amend." Furthermore, the decision in this case was also grounded upon the provision respecting the time within which claims may be proved after being liquidated by litigation.

In the decision of the Supreme Court in this same

case it was pointed out that an original claim was filed within the year, and that the claim upon which the original proof was made was the same as that ultimately proved, and that the substituted claim was filed by consent of the trustee.

The case of *In re Patterson-MacDonald Shipbuilding Company*, 288 Federal, 546, cited on page eleven of appellant's brief, did not involve a claim against the estate of a bankrupt, governed by Section 57-n of the Act, at all, but was a matter of establishing an expense of administration.

We shall not further discuss in detail the cases cited on this proposition. An examination of them will show that where the amendment was permitted, it was upon the basis, as was said in *In re McCarty Portable Elevator Co.*, 205 Fed. 986:

> "That the claim proved presents, in substance, that which the amendment seeks to make effective."

The question here, however, is not so much one of law as of fact. At page eighteen of appellants' brief, referring to the letter of August 28th, 1920, which is now sought to be amended, it is said:

> "Had it not demanded or claimed an indebtedness against the bankrupt, it might not have been amendable."

In other words, it is admitted that if this letter was not presented as a claim against the estate of the bankrupt, with the intention of being so accepted and considered by the trustee, it cannot be treated

as the basis of amendment. What is the fact, then, in this regard?

The only thing that was done, was the mailing to the trustee of the letter of August 28th, 1920. In the first place, this letter did not purport to set forth a demand or claim of these appellants at all, but was a demand in the name of the Carstens Packing Company, a corporation by its secretary and treasurer. In the next place, it did not indicate the assertion of any claim or demand against the bankrupt's estate at all. It is clearly apparent that the signer of the letter did not intend to put himself or itself in the place of a creditor of the estate. It was a notification to the trustee directing *him* to pay, not to the appellants or to the signer of the letter even, but to the county, certain accrued taxes for the year 1919, which were due and payable before the date of bankruptcy, forthwith and in full, regardless of the percentage of distribution that might be made to other general creditors, and notifying him that if same were not paid, some action would be taken, presumably in accordance with the provisions of the lease. From the appellant's petition herein, (Tr. pp. 1-6) and from the agreed statement of facts, (Tr. p. 20) it is clear that the contention of appellants at the time of commencement of these proceedings, which was some eighteen months after the time for filing claims had expired, was that the 1919 taxes referred to in the letter of August 28th, should be paid as an expense of administration by the trustee. In other words, the

appellants themselves did not, prior to that time, undertake to assert such a claim, or consider it as a claim against the estate of the bankrupt, provable by them at the date of bankruptcy. What they were asking and demanding by that letter, and intending to assert was not a status as a creditor with a provable claim, but an immediate payment in full by the trustee as an expense of administration, of an amount claimed to be due for taxes which had accrued prior to the bankruptcy.

> "The letter demands payment of the representative of the estate, and that he make the payment on the same basis as the bankrupt had paid under the lease. It most certainly evidences an intention to require the representative to make the payment."
>
> Appellant's brief, p. 21.

It seems quite apparent from appellants' claim and the testimony of Mr. McCord, that they never intended, until at or about the time of the hearing before the Referee, to file a claim for the 1919 taxes as a claim against the estate. They proceeded on the theory that if the trustee occupied the premises, he necessarily accepted the lease and all of the burdens thereof, and would have to pay, as an expense of administration, prior to dividends to general creditors, any indebtedness that had accrued under the lease at the time of bankruptcy.

They claimed payment of these taxes from the trustee as a part of the compensation due from him on account of his occupancy of the premises. Such

compensation was, after a hearing, fixed by the Referee upon a basis with which the appellants are satisfied, and which they have accepted without appeal. (App. Br. p. 4). Any claim to such taxes as a part of the consideration of the trustee's occupancy therefor, has been comprehended in that judgment and satisfied by appellants' acceptance thereof.

Both the Referee and the District Judge found that the appellants did not by such letter intend to present a claim as creditors of the estate of the bankrupt to be allowed and paid as other claims of the same class, but that on the contrary, the manifest purpose thereof was to require the payment of taxes in full by the trustee, and as the District Judge said, "the intimation follows that the penalty or default for violation of the conditions of the lease would be invoked."

It is this matter of the purpose and intent of the appellants in presenting this letter, if it be considered as their act, which is the controlling and decisive factor in this case, and the Referee, who heard the witnesses, and the District Judge, having found not only an absence of such intent, but a positive and contrary purpose inconsistent with a claim against the estate, such finding should not now be disturbed, particularly where there is no evidence to the contrary.

The letter is wholly and completely insufficient as a proof of claim under Section 57-a of the Bankruptcy Act and General Order 21. None of the

authorities cited by appellants go so far as to permit of the filing of the claim as an amendment under such circumstances. A case very similar in point of fact, and in some respects much stronger than the present one, is that of *In re Thompson*, in which the decision of the District Court is reported in 222 Federal, 167, and the decision of the Circuit Court of Appeals affirming the same, in 227 Federal, 981. In that case it was held that a letter by the creditor, a bank, setting forth the amount of its notes against the bankrupt, but not asserting them as a claim against the estate or indicating that the letter was to be considered as such, was not a sufficient claim upon which an amendment could be made. The court said (227 Fed. at p. 983):

> "Much liberality has been shown by the courts in permitting imperfect claims and proof of claims to be put into proper form after the statutory period has expired, but we are advised of no decision that runs counter to the positive language of the act, and permits a claim that is wholly new, to be presented after the limitation has run. In some form, the substance of the claim must have been made within the proper time, but if this has been done, amendment may be made afterwards. Whether formal or informal, a claim must show (as the word itself implies) that a demand is made against the estate, and must show the creditor's intention to hold the estate liable."

The District Court, in passing upon the same case, said:

> "There is nothing in the bank's letter from which it can be inferred that it intended thereby to file a claim against the estate. Neither of the bank's officials who testified in this matter stated that such was the intention. There was no direction that such letter should be filed as a claim, and it was not so filed. To my mind, the rule declared in *Re McCallum & McCallum* (D.C.E. Dist. Pa.) 127 Fed. 768, is controlling. In that case Judge McPherson, at page 769, said:
>
> > 'With every disposition to be liberal in the allowance of amendments, there is nevertheless a limit to the power of the court in this regard. If the year within which claims may be proved is still unexpired, amendments are largely a matter of course; but after the expiration of the year a different situation is presented. The rights of creditors are then fixed by the act itself, and no new right can be introduced. If the proof of a right that had already been asserted in substance should thereafter be found to lack form or precision, ordinarily, I suppose, such defect might still be remedied; but, as Judge Archbald said in a similar case (his opinion was afterward adopted by the Circuit Court of Appeals): "The general right to amend, regardless of the time which has elapsed, is

> abundantly sustained by the authorities * * *. But to do so, it is plain, there must be in the record, as it stands, the substance of that which is asked for. The right to amend can go no further than to bring forward and make effective that which in some shape is already there." *In re Mercur* (D.C.) 116 Fed. 655; Id., on appeal 122 Fed. 384, 58 C.C.A. 472.' "

At pages 29 and 37 of their brief, appellants suggest that they were induced not to file a claim against the estate within the year by the representation of the trustee that he would pay the 1919 taxes. But the agreed statement of facts shows that it was not until April of 1921, after the year for proving claims had expired, that any representations were made by the trustee regarding the payment of such taxes, and that then no agreement was executed by authority of the court, and that during the year for filing claims, the trustee made no representation that the said taxes would be paid as a part of the expense of administration, nor did anything to mislead claimants, or influence or induce them not to file their claim. The appellants were not misled or prejudiced by any act of the trustee or the Referee, as was the case in *Bennett v. American Credit Indemnity Co.*, 159 Fed. 624, (App. Br. p. 22) and *In re Kessler*, 184 Fed. 51, (App. Br. p. 22).

Nor does the appellee admit what seems to have been considered as an important factor in some of

the cases, that the claim herein asserted is for a debt justly due and owing to appellants. On the contrary, the appellee will, if called upon to do so, resist and deny the claim, partly because it comprehends local improvement assessment items which are not properly taxes, and also because the estate is entitled to credit for a deposit made as security on the lease, and for overpayments, by mistake, of local improvement assessments which were thought to be taxes. We wish also at this point to challenge the statement made on page 34 of appellant's brief, that the creditors have received large dividends and since the case was heard below, have been paid in full, neither of which statements is correct, nor supported in any wise by the record herein.

Appellants also contend that they are in time with this claim, as an original filing, under the provisions of Section 57-n of the Act, respecting proof of claims liquidated by litigation. Such a theory is wholly inconsistent with, and must be construed as an abandonment of the contention that the claim now offered is an amendment of a claim contained in the letter of August 28th, 1920. If the claim is now sought to be filed as an amendment, based upon the letter of August 28th, 1920, it is unaffected by litigation. On the other hand, if it is claimed to be filed as an original under extention of time resulting from liquidation by litigation, it can derive no support from the theory of an amendment.

In any event, the theory is unsound. The litiga-

tion with the trustee was concerned with the question of whether or not he had accepted the lease and was bound to pay the full rental fixed by it after he took possession, or was responsible to appellants only for reasonable compensation during the period of his occupancy. There was no connection between this litigation over the rental due as an expense of administration, and the claim of the appellants as general creditors, for rental or taxes due prior to the bankruptcy.

As to those items, petitioners were limited to their claim against the estate.

In re Sherwood, 210 Fed. 754 (C.C.A. 2nd Cir.);

In re Mullings Clothing Co., 230 Fed. 681 (D. C. Conn.).

The liquidation proceedings referred to in Section 57-n of the Bankruptcy Act, relate to claims against the estate, and not to the settlement of amounts due from the trustee as expense of administration. The limitation provisions of that section have no application to claims against the trustee for expense of administration.

In re Greene, 231 Fed. 253. (D. C. Pa.)

The litigation between the trustee and appellants was not of the character, nor did it concern the subject matter of the claim now sought to be filed, so as to extend the time for filing such claim.

See

In re E. O. Thompson & Sons, 123 Fed. 174, (D. C. Pa.);

Moore v. Sims, 257 Fed. 540. (C.C.A. 6th Cir.).

Moreover, there was nothing unliquidated about the subject matter of this claim, making applicable the theory of an extension of time on account of liquidation proceedings under Section 57-n of the Act.

In their original petition, the appellants did not assert any right to file a general claim for such taxes, but endeavored to collect them in full from the trustee. It was only when they found that they could not succeed in this effort, that they, by their reply, set up the letter of August 28th, 1920, and asked permission to file an amended claim based thereon. Up until that time they had never given the slightest intimation that they considered themselves general creditors of the estate in the amount of such taxes. The petition against the trustee was not filed until October 2nd, 1922, whereas the year for filing claims expired March 21, 1921. If the mere assertion of an unfounded claim against the trustee should be held sufficient to excuse the failure to file it as a general claim against the estate, the limitations of the Act would be largely nullified.

We respectfully submit that the action of the Referee and the District Judge was right, and should be confirmed.

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